FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 28 1969

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. ~~813~~ ~~26~~ 9

FRED FERNANDEZ,

Appellant,

—v.—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT FERNANDEZ

ELEANOR JACKSON PIEL
36 West 44th Street
New York, N.Y. 10036
Attorney for Appellant

INDEX

SUBJECT INDEX

	Page
I. Violation of First Amendment Provisions Are Patent in Specific Allegations of Indictment Against Appellant Framed Under Plainly Unconstitutional Statutes	1
II. Although Appellant Seeks Declarative Relief Only, Injunctive Relief Against the State Proceeding Is in Order Under Judicial Interpretation of 42 U.S.C. §1983 and Is Consistent With American Law Institute Policy	9
III. The Minimum Monetary Requirement, Plus the Subjective Standards for Qualification of Grand Jurors, Are Plainly Discriminatory and Unconstitutional	12
IV. Although the Patent Unconstitutionality of the Statutes Call for Them to Be Declared Unconstitutional and Invalid—If Findings of Fact Are Relevant, a Hearing Is in Order to Determine Those Facts	14
Conclusion	15
Erratum	17

CITATIONS

CASES:

Carter v. *Jury Commission of Greene County, Alabama*, 37 L.W. 3322 (No. 908, March 5, 1969)	13
Dombrowski v. *Pfister*, 380 U.S. 479 (1965)	10
Douglas v. *City of Jeanette*, 319 U.S. 157 (1943)	10
Gregory et al. v. *City of Chicago*, —— U.S. ——, March 10, 1969, 37 L.W. 4213	8-9
Murdock v. *Commonwealth of Pennsylvania*, 319 U.S. 105 (1943)	10

Page

People v. *Epton*, 19 N.Y. 2d 496, 227 N.E. 2d 829 (1967) cert. den. app. dism. 390 U.S. 29, reh. den. 390 U.S. 976 ..... 2, 6, 8, 9, 11

People v. *Ferguson*, 55 Misc. 2d 823, 286 N.Y.S. 2d 924 (1968) 12

Shuttlesworth v. *City of Birmingham*, —— U.S. ——, March 10, 1969, 37 L.W. 4203 8

United States v. *Robel*, 389 U.S. 258 (1967) 8

Yates v. *United States*, 354 U.S. 298 (1957) 6

Zwicker v. *Boll*, 270 F. Supp. 131 (W.D. Wisconsin 1968) affd. 391 U.S. 353 (1968) 11

STATUTES:

United States Constitution
First Amendment 1, 7, 8
United States Code
18 U.S.C. §2385 (The Smith Act) 6
28 U.S.C. §2283 ..... 9, 10
42 U.S.C. §1983 9
New York Judiciary Law (former)
Section 596 (3) 15
Section 661 15
New York Judiciary Law
Section 596 (6) 12, 15
Section 609 ..... 13, 15
New York Penal Law (former)
Section 160 et seq. 2, 15
Section 163 6
New York Penal Law
Section 240.15 9

MISCELLANEOUS:

American Law Institute Tentative Draft
No. 5 11
No. 6 ..... 10, 11

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 813

FRED FERNANDEZ,

Appellant,

—v.—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT FERNANDEZ

I.

Violation of First Amendment Provisions Are Patent in Specific Allegations of Indictment Against Appellant Framed Under Plainly Unconstitutional Statutes.

Appellants, argue the appellees, were not indicted for any crimes involving the dissemination of ideas under the New York anarchy statutes, but rather for their "hard core" conduct aimed at the overthrow of the state and

local government of New York [MB 7, 32, 38; LB 12].* The thrust of this argument is two-fold:

1. Because appellants are "hard core" criminals they have no standing to attack the unconstitutionality of the anarchy statutes.

2. Even though the language of P.L. §160 et seq. (anarchy) is vague, the specificity of the indictment as to the anarchy charges plus recent state court interpretation [*Epton*] confirm the validity of the indictment and the statutes under which it was brought and gave fair warning to appellants [LB 10; MB 8, 38].

It is true that the omnibus indictment containing 48 counts charges the appellants with arson and weapons crimes—the constitutional validity of which are unchallenged in this proceeding. Appellant Fernandez and his co-appellants do, however, assert the unconstitutionality of the anarchy statutes, which portion of the indictment cannot be constitutionally embellished by reliance on "hard core", common law crimes.

Reference to the indictment itself underscores the vagueness of the charge. The first count of the indictment charges that Fernandez and the other defendants

> "did wilfully, knowingly and intentionally advocate by word of mouth and in writing the duty, necessity and propriety of overthrowing and overturning organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies, by force and violence, to wit, the use of

---

* References to pages in the briefs of District Attorney Mackell appear by "MB" followed by a number; to the brief of the Attorney General by "LB" followed by a number.

rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said state and its various political subdivisions and agencies, including peace officers thereof and by assassination of said executive officials, and by other unlawful means and with the further intent that said acts be presently attempted and accomplished."

The second count of the indictment charges that Fernandez and the other defendants

"did wilfully, knowingly and intentionally print, publish, edit, issue, circulate, distribute and display certain papers and documents entitled, 'Total Resistance', 'Community Self Defense', 'The Struggle for Black State Power in the U.S.' and other written and printed matter containing and advocating, advising and teaching the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies should be overthrown by force and violence, to wit, by sabotage of public transportation and communication facilities, assassination of police officers of said State and its various political subdivisions and agencies, and members of the State Guard of said State, and by other unlawful means, and with the further intent that said acts be presently attempted and accomplished."

The third count charges that Fernandez and the other defendants

"did wilfully, knowingly and intentionally organize and help to organize and become a member of and volun-

tarily assemble with each other, the same constituting a society, group and assembly of persons formed to teach and advocate the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies, be overthrown by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials, and by other unlawful means and with the further intent that said acts be presently attempted and accomplished."

The fourth count—a conspiracy count—charged that Fernandez and the other defendants

"did wilfully, knowingly and intentionally conspire, confederate and agree with each other and with persons known and unknown to the grand jury, to advocate criminal anarchy, by the following means, among others: by advocating by word of mouth and in writing the duty, necessity and propriety of overthrowing and overturning organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies, by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdivisions and agencies, includ-

ing peace officers thereof, and by assassination of said executive officials, and by other unlawful means; by printing, publishing, editing, issuing, circulating, distributing and displaying certain papers and documents entitled, 'Total Resistance', 'Community Self Defense', 'The Struggle for Black State Power in the U.S.' and other written and printed matter containing and advocating, advising and teaching the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies should be overthrown by force and violence, to wit, by sabotage of public transportation and communication facilities, assassination of police officers of said State and its various political subdivisions and agencies, and members of the State Guard of said State, and by other unlawful means; and by organizing and helping to organize and becoming a member of and voluntarily assembling with each other, the same constituting a society, group and assembly of persons formed to teach and advocate the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies, be overthrown by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials, and by other unlawful means; all with the further intent that said acts be presently attempted and accomplished."

Thereafter under the fourth count nineteen overt acts are alleged to support the conspiracy charge. Fourteen of the nineteen overt acts involve meetings and discussions among the defendants and/or the dissemination of literature. Only six of the overt acts include the defendant Fernandez. The above four counts are the only charges of anarchy lodged against Fernandez.*

It is to be noted again and again that all the anarchy charges have to do with discussion of ideas, advocacy of doctrine, assemblages, and dissemination of certain specific leaflets and pamphlets. No language in the indictment suggests the clear and present danger of this discussion or advocacy resulting in harm to the state or to the locality.** There is further no allegation in the indictment that the defendants were exhorting to "immediate action" nor was there any assertion that they constituted a group of sufficient size and cohesiveness as to justify the apprehension that action would occur. The *Smith Act* has been read by this Court to impose those requirements. *Yates* v. *United States*, 354 U.S. 298, 321 (1957).

Of more compelling weight, however, is the argument that the District Attorney seeks by this prosecution bottomed on anarchy, to proscribe defendant's conduct in the area of speech, writing and assemblage, traditionally

---

* Counts six and seven charge other defendants Samuels and Stewart with violation of P.L. §163 (permitting premises to be used for assemblages of anarchists).

** As pointed out in co-appellants Samuel's brief p. 12 the *Epton* [*People* v. *Epton*, 19 N.Y. 2d 496, 227 N.E.2d 829 (1967) cert. den. app. dism. 390 U.S. 29, reh. den. 390 U.S. 976] court seemed to find it sufficient that the clear and present danger be "that . . . riot . . . would be intensified or . . . rekindled", not that the government—state or local—be overthrown.

protected by the First Amendment. The District Attorney further seeks to strengthen, or perhaps validate, the other charges—of arson, and weapons possession—by the argument that defendant's unlawful intent did not involve the "usual purpose of robbery or assault" [MB 8, 32, 33]. Appellee charges that the purpose was the "overthrow of 'the government of the State of New York and its various political subdivisions and agencies'" [*ibid.*].

The record reveals that the defendants were first indicted for attempting to overthrow "the government" clearly implying the government of the United States.* Nor did there appear to be a real change of position in the superseding indictment which, although apparently confining itself to state and local government relied on a document entitled "The Struggle for Black State Power in the U.S." to support its anarchy charges [Appendix 19, 21, 22].

In an attempt to further prejudice the Court against the appellants herein appellee District Attorney in his brief in opposition indulges in testimonial narrative unsupported by record references as to his knowledge of defendant's activities [MB 31]. Again, as in his misleading press releases [See Appellant Fernandez Brief, pp. 65-78] relied on by appellant to show the unfairness of the within prosecution, the appellee District Attorney refers to a conspiracy to murder charge and trial against and conviction of two of the defendants (Ferguson and Harris) which charges are totally unrelated to the indictments in the instant action [MB 4, 9, 31].

By the technique of depicting the defendants-appellants herein as bad men not worthy of the court's consideration

---

* Appellant Fernandez Brief, pp. 56, 58, 67, 68, 71, 73, 75.

and against whose activities there should be a proscriptive law, the respondents seek to deprive appellants of standing to challenge overbreadth and vagueness of the anarchy statutes. This Court, however, has more generally followed the policy that

> "an accused . . . does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him."

This Court further views with disfavor attempts to stretch legislation to save it from constitutional infirmity in the First Amendment area, *United States* v. *Robel,* 389 U.S. 258, 265-268 (1967).

The court below, relying on *Epton,* and the appellees, similarly, give undue weight to the power of a court to interpret vague statutory language so that it passes as valid specific legislation. Appellant remains mystified as to how a new judicial interpretation on May 16, 1967 could relate back to the continuing crimes of anarchy charged against appellant and his co-defendant commencing October 1, 1965 and continuing to June 21, 1967.

This Court has had occasion recently to deplore and disapprove an equally "remarkable job of plastic surgery" performed on the face of legislation. *Shuttlesworth* v. *City of Birmingham,* —— U.S. —— (March 10, 1969), 37 L.W. 4203, 4205. Similarly, this Court is cognizant of the capacity of legislatures and requires them to draft specific legislation to proscribe specific evils. See *Gregory et al.* v. *City of Chicago,* —— U.S. ——, March 10, 1969, 37

L.W. 4213, 4214-4215 (concerning opinion of Mr. Justice Black).

In the case at bar the legislature had already made an attempt to limit the broad scope of the anarchy laws by its amended law effective September 1, 1967 [P.L. §240.15] which appellee District Attorney refers to as an incorporation of the old law "for the sake of clarity." Appellant views the new law as infirm constitutionally as the old, but that issue is not directly before this Court at this time.

The failure of the New York State courts to apply constitutional doctrine in *Epton* requires this Court to set the judicial record in order at this time as to the validity of the "Gitlow" statutes in the sixth decade of the twentieth century.

II.

Although Appellant Seeks Declarative Relief Only, Injunctive Relief Against the State Proceeding Is in Order Under Judicial Interpretation of 42 U.S.C. §1983 and Is Consistent With American Law Institute Policy.

Appellees argue that 28 U.S.C. §2283 is a bar to the present proceeding under well established principles of federalism for if 42 U.S.C. §1983 was any exception whatsoever, the exception would be swallowing the rule [MB 11, LB 2]. The interests of justice would seem to be served in the case at bar, however, by the remedy of declaratory relief on the issue of the constitutionality of the statutes involved.* To date this Court has not squarely met the issue of whether relief is available to challenge a

* See note Appellant Fernandez brief n. 34 p. 43.

claimed unconstitutional statute or proceeding in a criminal case. The logic of *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), reasonably extends itself to cover the situation of the case at bar—nor is *Douglas* v. *City of Jeanette*, 319 U.S. 157, 165 (1943), cited by appellees [MB 15, 20 LB 4] a bar to relief here. In denying an injunction against the enforcement of statute held that very day to be unconstitutional in another case (*Murdock* v. *Commonwealth of Pennsylvania*, 319 U.S. 105 (1943)), this court there said:

> "There is no allegation here and no proof that respondents would not, nor can we assume that they will not, acquiesce in the decision of this Court holding the challenged ordinance unconstitutional as applied to petitioners."

The American Law Institute has addressed itself to this issue in its Study of the Division of Jurisdiction between State and Federal Courts and in that connection has formulated Section 1372* to interpret 28 U.S.C. §2283 in the light of current judicial thinking and opinion. The new proposed rule would prohibit injunctions to stay proceedings in state courts with seven express exceptions. Exception (7), relevant here, would permit an injunction if otherwise warranted where

> "the injunction is to restrain a criminal prosecution that should not be permitted to continue either because the statute or other law that is the basis of the prosecution plainly cannot constitutionally be applied to the party seeking the injunction or because the prose-

* P. 41 Tentative Draft No. 6, April 1968.

cution is so plainly discriminatory against one who has engaged in conduct privileged under the Constitution or laws of the United States as to amount to a denial of the equal protection of the laws".

A reporter's note [to tentative Draft 5 quoted in Judge Fairchild's concurring opinion in *Zwicker* v. *Boll*, 270 F. Supp. 131, 138 (W.D. Wisconsin 1968), affd. 391 U.S. 353 (1968)] stated:

"Exception (7) goes beyond present law to, permit an injunction in certain civil rights cases where the very existence of a state prosecution may have a chilling effect on others who wish to exercise rights guaranteed by the Constitution of the United States." •

The case at bar would clearly come within exception (7) on the grounds that

"the statute . . . that is the basis of the prosecution plainly cannot be constitutionally applied to the party seeking the injunction."

Appellant further contends that the history of the anarchy statutes, which reveals their invocation only once before in 45 years [*Epton*] by the State of New York, also reveals their discriminatory application. They are directed against him and his co-defendants as black citizens in the exercise of their civil rights.

• The commentary attached to Tentative Draft #6 tells us that in meetings on exception (7) the American Law Institute in 1967 voted 102 to 65 to approve in principle clause (7) as it stood . . . p. 231.

III.

The Minimum Monetary Requirement, Plus the Subjective Standards for Qualification of Grand Jurors, Are Plainly Discriminatory and Unconstitutional.

The Appellee Attorney General has failed to reply to appellant's challenge to the statutes providing for the selection of Grand Jurors in New York State. Appellee District Attorney treated appellant's challenge as restricted to the $250 property requirement, and ignored the subjective criteria written into the law and currently unrepealed by the legislature. These criteria require a prospective juror to "be intelligent; of sound mind and good character; well informed" (Judiciary Law §596(6)). Appellees further ignored appellant's challenge to Judiciary Law §609 in effect at the time the Grand Jury sat to return the superseding indictment in January 1968.* Section 609 is appropriately challenged, however, since at the time the Grand Jury returned its superseding indictment

---

* By *erratum* on p. 17 *infra*, it is noted that appellant erroneously informed the Court that the superseding indictment was returned in September of 1967. In fact it was not returned until January 15, 1968. The erroneous September references appear on pp. 4, 7, 10, 14, and 35 of Appellant Fernandez' brief.

In this regard, appellant notes the emphasis placed by Appellee Mackell on the appearances of appellants in the state court over a period of time extending through 265 days for a total of 58 formal motions (MB 9, A12-17). What the Appellee neglects to mention is that Appellants attained a degree of success in these legal proceedings. The State Court struck down the first indictment on January 10, 1968 (*People* v. *Ferguson*, 55 Misc. 2d 823, 286 N.Y.S. 2d 924). Thus this action in the federal court was not brought 265 days after the indictment on which appellant-defendant was charged and will have to go to trial (failing this proceeding), but was brought (on March 12, 1968) a little over a month after the superseding indictment was filed in January, 1968.

against Fernandez. §609 requiring the County Clerk to make a "special investigation" of persons qualified to serve as Grand Jurors and to make a list of the persons the "investigation shows are suitable to serve" was in effect.

Appellant urges that these sections are clearly in violation of his right as part of due process of law to a fair and impartial Grand Jury representing a cross-section of the community (see Appellant Fernandez' brief, pp. 35-40).

Appellant has further noted that this Court will hear argument in *Carter* v. *Jury Commission of Greene County, Alabama,* 37 L.W. 3322 (No. 908, Jurisdiction noted March 5, 1969) on the constitutionality of a statute which requires jurors to be "reputed to be honest and intelligent and . . . esteemed in the community for their integrity, good character, and sound judgment."

Accordingly, the issue is ripe for this Court to consider and decide that the system under law in New York for the selection of Grand Jurors is discriminatory, and therefore unconstitutional.

IV.

Although the Patent Unconstitutionality of the Statutes Call for Them to Be Declared Unconstitutional and Invalid —if Findings of Fact Are Relevant, a Hearing Is in Order to Determine Those Facts.

The court below decided the case on the constitutional issues on its merits in the absence of a hearing, despite the factual issues raised by the pleadings.

Appellee Attorney General states categorically that no bad faith need be shown where there are charges of "murder, arson and sabotage," and that this federal proceeding "needlessly" interrupts a state prosecution (LB 4, 5). Appellee District Attorney speaks of the finding by the court below of "good faith (MB 28)—on what factual basis, appellant is at a loss to know. Certainly the charges made in appellant's complaint—i.e., that he is a black Afro-American citizen participating in peaceful protest activities centered around freedom for all American citizens categorized as Negroes and Puerto Ricans—and that the Defendant Mackell has initiated a course of conduct calculated to deprive plaintiff-appellant and others of their constitutionally secured rights, privileges and immunities—should not be ignored (Appendix 12-13).

Appellant Fernandez further asserts in his complaint the conduct of Appellee District Attorney in prejudicially mixing the attempted murder prosecution of the two co-defendants (Harris and Ferguson) with the anarchy cases as to prejudice his (Fernandez') cause. This same course of conduct has been followed by appellee Mackell in the filing of his brief in this Court (MB 9, 31).

Yet no hearing as to any of these facts has been held.

It is submitted that all the statutes challenged in this proceeding are invalid on their face—and plainly so. Accordingly, the facts and a finding thereon, may be immaterial to a proper judgment for appellant in this case. Nonetheless, if any weight is to be attached to the counter assertions of appellees, a hearing should be held.

Conclusion

The judgment of the court below should be reversed and the court directed to declare former Penal Law §160 et seq. and former Judiciary Law §596 (3), 661 and present Judiciary Law §596 (6) and §609, unconstitutional.

Respectfully submitted,

Eleanor Jackson Piel
Attorney for Plaintiff-Appellant,
Fred Fernandez

Erratum

Erratum: In Appellant Fernandez Brief in this Court it erroneously appeared that the superseding indictment was returned in September of 1967. In fact, it was not returned until January 15, 1958, after Justice Irwin Shapiro dismissed the indictment on January 10, 1968 (*People* v. *Ferguson*, 55 Misc. 2d 823, 286 N.Y.S. 2d 924). The erroneous September references appear on pp. 4, 7, 10, 14 and 35 of the Fernandez Brief.

The citation to *Harris* v. *Younger*, in Appellant Fernandez Brief in the Index and on p. 28 should read, 281 F. Supp. 507.

SUPPLEMENTAL

BRIEF

FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 13 1969
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. ~~26~~ 9

FRED FERNANDEZ,

Appellant,

vs.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF AFTER ARGUMENT AND BEFORE REARGUMENT

ELEANOR JACKSON PIEL
Attorney for Appellant
36 West 44th Street
New York, New York 10036

INDEX

	Page
Point I	1
Point II	18
Conclusion	19

CITATIONS

CASES:

Aptheker v. *Secretary of State*, 378 U.S. 500 (1964)	13
Avery v. *Georgia*, 345 U.S. 559 (1953)	18
Bouie v. *City of Columbia*, 378 U.S. 347 (1963)	17
Brandenburg v. *Ohio*, —— U.S. ——, June 9, 1969, 37 L.W. 4525	2, 8, 9, 10
Brooks v. *Beto*, 366 F. 2d 1 (C.A. 5, 1966)	18
Dennis v. *United States*, 341 U.S. 494 (1951)	3, 5, 6
Epton v. *New York*, Petition for Certiorari, No. 502, Oct. Term, 1967	4
Garner v. *Louisiana*, 368 U.S. 157	10
Gitlow v. *New York*, 268 U.S. 652 (1925)	3, 12
Harris v. *Younger*, 281 F.S. 507 (C.A. 9, 1968)	9
Herndon v. *Lowry*, 301 U.S. 242 (1931)	4
Keyishian v. *University of New York*, 385 U.S. 589 (1967)	4, 5, 6, 7
Lanzetta v. *New Jersey*, 306 U.S. 451 (1938)	11
Murdock v. *Commonwealth of Pennsylvania*, 319 U.S. 105, 115 (1943)	10
N.A.A.C.P. v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958)	10, 13, 17
Noto v. *United States*, 367 U.S. 290 (1961)	16

Page

Pennsylvania v. *Nelson*, 350 U.S. 497 (1955) ..3, 5, 7, 16
People v. *Epton*, 19 N.Y. 2d 496 (1967) cert. den. app. dism. 390 U.S. 29; reh. den. 390 U.S. 976 (1968) 2, 4, 6, 7, 8, 10, 11, 12, 15, 16, 17
People v. *Gitlow*, 195 A.D. 773, 187 N.Y.S. 783 (1921), 234 N.Y. 132 (1922) 3, 8

Scales v. *United States*, 367 U.S. 203 (1961) 6, 16
Shelton v. *Tucker*, 364 U.S. 479 (1960) 13
Shuttlesworth v. *City of Birmingham*, —— U.S. ——, (March 10, 1969) 37 L.W. 4203 ..... 11, 12

United States v. *Robel*, 389 U.S. 258 (1967) 13, 15
Uphaus v. *Wyman*, 360 U.S. 72 (1959) 3, 4

Whitney v. *California*, 274 U.S. 357 (1927) 9, 10
Whitus v. *Georgia*, 385 U.S. 545 (1967) 18
Winters v. *New York*, 333 U.S. 507 (1948) 10

Yates v. *United States*, 354 U.S. 298 (1957) 16

STATUTES:

United States Constitution:
First Amendment 10, 12, 13

United States Code:
18 U.S.C. §2385 [*The Smith Act*] 3, 7

New York Judiciary Law (former):
Section 596 19
Section 661 19

New York Judiciary Law:
Section 609 19

New York Penal Law (former):
Section 160 et seq. 2, 3, 4, 5, 6, 12, 16, 17, 18, 19

New York Penal Law:
Section 240.15 "Practice Commentary" McKinney's Consolidated Laws Annotated (1967) 5

Ohio Revised Code:
Section 2923.13 8

Page

MISCELLANEOUS:

Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties, Cornell University Press (1956) 14

"Judicial Rewriting of Overbroad Statutes Protecting the Freedom of Association from Scales to Robel," 57 Cal. L. R. 240 (1969) 14

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 20

FRED FERNANDEZ,

Appellant,

vs.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF AFTER ARGUMENT AND BEFORE REARGUMENT

I.

Appellant Fred Fernandez offers this supplemental memorandum addressed to certain questions raised by the Court with counsel during argument previously heard in this case on April 1, 1969, and based upon new considerations which inevitably arise as the result of this Court's

decision on June 9, 1969, in *Brandenburg* v. *Ohio*, —— U. S. ——, 37 L. W. 4525.

A question asked by this Court, in several ways, was whether or not New York Penal Law §§160 et seq. are constitutional with the gloss put upon them by the New York Court of Appeals in *People* v. *Epton*, 19 N. Y. 2d 496 (1967).

An operational answer to this question obviously requires 1.) analysis of what the gloss of *Epton* read into §§160 et seq. and 2.) decision whether the legislation with that gloss meets present constitutional standards as to legislation in the realm of "sedition."

In addition, the ruling by the New York Court of Appeals in *Epton* raises a serious due-process question: whether a state court may develop a gloss upon a statute inconsistent with a rewriting of the same statute by the legislature of the state and at variance with this Court's last interpretation of the same statute.

Finally, the instant case raises the familiar *ex post facto* question in a new form: whether such a gloss read into a statute by a state court may be applied to acts that occurred prior to such reading.

A review of the circumstances surrounding the instant case will set the context for this attempt to answer these questions.

New York Penal Law §§160 et seq.[1] were passed by the legislature of the State of New York in 1902 shortly after

[1] The text of P. L. §160 and §161 is set forth in Appellant Fernandez' Brief, pp. 47, 48. Section 163 is set forth in Appellant Samuels' Brief, p. 37.

the assassination, in New York State, of President McKinley by a self-confessed anarchist. New York's anarchy laws were not effectively invoked, however, until many years after when on February 5, 1920, a New York jury found Benjamin Gitlow, a socialist, guilty of anarchy. That conviction was affirmed by the Appellate Division, 195 A. D. 773, 187 N. Y. S. 783 (1921), and by the Court of Appeals, *People* v. *Gitlow*, 234 N. Y. 132 (1922), and finally affirmed by this Court in 1925, *Gitlow* v. New York, 268 U. S. 652. This Court found §§160 et seq. constitutional. In so doing, this Court held that state law could make a crime of the mere advocacy of a proscribed doctrine, even in the absence—as is underlined by the celebrated dissent of Justices Holmes and Brandeis—of a clear and present danger of the evil the legislature sought to proscribe.

New York Penal Law §§160 et seq. again drew notice of this Court in *Dennis* v. *United States*, 341 U. S. 494 (1951), where it was dealt a glancing blow. On this occasion, however, the Court plainly indicated that it would agree with the Holmes-Brandeis dissent in *Gitlow* rather than the majority opinion; the *Dennis* decision leaves the distinct impression that *Gitlow* is no longer the law. Four years later, this Court struck another blow at *Gitlow*, and state criminal syndicalism laws in general, in *Pennsylvania* v. *Nelson*, 350 U. S. 497 (1955); the Court there held that the Smith Act and its associated legislation had preempted the field and that state courts could not penalize persons specifically for committing sedition because federal law imposed sanctions on seditious activities.[2]

[2] It is not here contended that common-law-variety crimes could not be grist for the state legislative mill. See *Uphaus* v. *Wyman*,

In January, 1967, this Court struck still another blow at the New York anarchy statutes as written in 1902. In *Keyishian* v. *University of New York*, 385 U. S. 589, 599, this Court said that "the possible scope of 'seditious' utterances or acts has virtually no limit" as defined in §§160 and 161 of the New York Penal Law, and declared two sections of the Education Law which relied on those definitions to be unconstitutional.[3] The effect of the *Keyishian* ruling was a declaration by this Court that §§160 and 161 defined a crime in an unconstitutionally vague manner.

New York Penal Law §§160 et seq. does not appear in the record again until 1964. In that year the old sedition acts were exhumed to prosecute a Negro political leader for activities connected—by the associated charges of riot and conspiracy to riot—with the Harlem riot of July 18, 1964.[4]

It was only after the *Epton* indictment that the New York legislature—reminded of its anarchy laws and the opinions of this Court and engaged in an overall review

---

360 U.S. 72 (1959). There is no challenge in the case at bar to the constitutionality of the weapons and arson statutes applied in forty-one counts of the indictment.

[3] Justices Clark, Harlan, Stewart and White dissenting. Mr. Justice Clark's dissent is 1.) to the posture of the case, i.e. administrative remedies had not been exhausted, 2.) to the right of a state to set rules for teachers and, 3.) to distinguishing the application of this doctrine from criminal cases, i.e. *Herndon* v. *Lowry*, 301 U.S. 242 (1931) p. 627.

[4] The charge of riot [Penal Law 2090] was dismissed by the trial court at the conclusion of the people's case for failure of evidence to support such charge; the charge of conspiracy to riot was submitted by the judge to the jury after the court—upon conclusion of the entire case—permitted amendment of the indictment to conform to proof. [*Epton* v. *New York*, Petition for Certiorari, No. 502, Oct. Term, 1967, pp. 7, 9.]

and recodification of the State Penal Code—repealed §§160-164 substituting in their place a new section, §240.15. The new legislature responded in particular to the *Nelson* decision and decided that New York could no longer constitutionally proscribe seditious activity against the federal government (see "Practice Commentary" in McKinney's Consolidated Laws Annotated, 1967).[5] The legislature retained, however, the advocacy-of-doctrine concept when it made the new felony the advocacy of "the overthrow of the existing form of the government of this State [New York] by violence." It further proscribed publication of such doctrine or distribution of any documents so concerned "with knowledge of its contents" or membership in any organization advocating such doctrine "with knowledge of its purpose."

The legislature did not heed this Court's warning in *Dennis* that clear and present danger of the fact of such overthrow must be imminent nor did it specify any necessary criminal intent. Along with the corpus of the new Penal Code, of which it was a part, this redefinition of the crime of New York anarchy was set by the legislature to take effect September 1, 1967.

Notwithstanding the New York legislature's effort to make its anarchy statutes conform with *Nelson* and ignoring equally the opinion of this Court in *Keyishian,* the Court of Appeals of New York affirmed the anarchy con-

---

[5] The indictment against the appellant Fernandez recites in support of its "anarchy" charge against him the publishing and circulating of a document entitled "The Struggle for Black State Power in the U.S." [A. 19, 21, 22]—a charge which on its face would appear to involve the national government.

viction of Epton in May, 1967 (four months after *Keyishian*).[6]

New York went further. In *Epton,* the Court of Appeals candidly conceded that §§160 and 161 as interpreted in *Gitlow* are unconstitutional because of the failure of the statute to require "a showing of 'clear and present danger' before one's freedom of speech may be abridged. . . ."

The Court of Appeals flatly ignored the legislature's action in 1965 where, in reconsidering the anarchy statute, the legislature still failed to include in a revised version any consideration of "clear and present danger" or of intent or capacity to bring about the anticipated evil, or as to the advocacy part of the statute, of the proviso that the advocacy be knowing, *Scales* v. *United States,* 354 U. S. 298 (1957).[7]

Instead, the court read into the ancient 1902 statute language which it assumed was "in harmony with the United States Constitution and the Constitution of the State of New York."

---

[6] The Court of Appeals said: "The advocacy of the overthrow of the government by force and violence must be accompanied by an intent to accomplish the overthrow," citing *Dennis* and *Keyishian,* p. 506. The failure to mention that this Court in *Keyishian* found §§160 and 161 unconstitutionally vague as a definition of sedition is significant.

[7] In *Scales,* this Court said:

> "The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence as 'a rule or principle of action,' and employing 'language of incitement,' . . . is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur."

> "Now that our criminal anarchy statute is again before us, we have the obligation of construing it in accordance with sound constitutional principles so as to preserve its constitutionality." (p. 505)

Accordingly, that court attempted to read into the statute what it believed this Court had said in a line of opinions since 1925.

In so doing it dismissed *Pennsylvania* v. *Nelson,* 350 U. S. 497. It distorted *Keyishian* (see *supra,* p. 6 (footnote 6)). It ignored the specific intervening acts of the legislature. It dismissed as inconsequential the argument that changing the stated meaning of a statute after the so-called criminal act is a denial of procedural due process to a defendant—replying that a "defendant can be charged 'with knowledge of the scope of subsequent interpretation' by this Court." (p. 506) This even though the subsequent interpretation did not involve the specific state statutes but instead a federal law, the Smith Act.

Finally the Court of Appeals held that the "clear and present danger" of evil need not be the evil defined by the legislature in the statute, i.e. overthrow of organized government by force and violence, but need only be "that the riots then rocking Harlem would be intensified or, if they subsided, rekindled."

Although requested, this Court did not reach the merits in *Epton* and the Court of Appeals decision remains the law in New York. *People* v. *Epton, supra,* cert. den. app. dism. 390 U. S. 29; reh. den. 390 U. S. 976 (1968).

Barely a month passed after the *Epton* opinion in the Court of Appeals when the District Attorney in Queens

charged the Appellant Fernandez and fifteen others with the crimes of anarchy and conspiracy to commit anarchy coupled in Fernandez' case with one additional charge, the misdemeanor charge of conspiracy to commit arson in the Third Degree.

The indictments in both *Epton* and in the case at bar involved Negroes and the charge that they subscribed to unpopular political views [sedition], coupled with charges of riot and conspiracy to riot [*Epton*], conspiracy to commit arson in the Third Degree [*Fernandez*] and weapons possession [*Samuels*]. Since *Gitlow,* prosecuted in New York in 1920, the anarchy statute has been exclusively invoked against Negroes. The thought crime, either alone or coupled with some action crime, is now being adapted by prosecutors in other communities against Negro defendants in the effort to suppress urban ferment and protest.

At the last session of this Court, argument was presented challenging the constitutionality of the Ohio Criminal Syndicalism statute enacted in 1919. The case, *Brandenburg* v. *State of Ohio,* —— U. S. —— (June 9, 1969), 37 L. W. 4525, was before this Court in a different posture from that of the case at bar.[8] It had come up on direct appeal after a conviction under the statute, the Ohio court having upheld the conviction without opinion. This Court there reversed the conviction stating:

> ". . . the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe

[8] The defendant there was convicted of two counts of sedition only (Ohio Revised Code 2923.13). There were no associated common law crimes joined with the sedition charges as in the case at bar.

> advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in *Noto* v. *United States* (367 U. S. 290, 297-298, 1961), 'the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action' (see also *Herndon* v. *Lowry,* 301 U. S. 242, 359-261, 1937; *Bond* v. *Floyd,* 385 U. S. 116, 134, 1966). A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control." (pp. 4525, 4526)

In the course of its opinion, this Court further overruled *Whitney* v. *California,* 274 U. S. 357 (1927), involving a statute similar to the Ohio statute—and also similar to the *Gitlow-Epton-Samuels-Fernandez* statute—on the grounds that "*Whitney* has been thoroughly discredited by later decisions."

Nor can it be overlooked that argument in the within case is to be joined with that in *Harris* v. *Younger,* 281 F. S. 507, where a three-judge federal court has held the California criminal syndicalism law unconstitutional in a proceeding under §1983, as in the instant case, prior to *Brandenburg.*

The distinction between *Harris* and *Fernandez* is that in the former no state opinion has specifically upheld the

state's syndicalism legislation. The California courts refused to review the validity of the indictment under a writ of prohibition sought by Harris, which refusal represented a following by the California court of this Court's 1927 *Whitney* decision, upholding the constitutionality of the syndicalism law.

Predicated on the logic of the Court of Appeals of New York in the *Epton* ruling, subscribed to by the court below, the California court now may at will revive California's syndicalism law by reinterpreting it to meet what it deems to be appropriate standards of the day and then reapply the law to acts which took place prior to the new definition. Such procedure would follow the *Epton* logic and circumvent this Court's overruling of *Whitney* v. *California, supra,* in *Brandenburg.*

This Court has said that it is bound by a state's interpretation of its own statute and will not substitute its judgment for that of a state. *Garner* v. *Louisiana,* 368 U. S. 157, 169 (1961). But there appears to be a qualification to this delegation of interpretive power to the state judicial power particularly as to cases which touch upon rights traditionally under the protection of the First Amendment. *Murdock* v. *Commonwealth of Pennsylvania,* 319 U. S. 105, 115 (1943); *N.A.A.C.P.* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 461 (1958).

Nor does this Court accept uncritically the gloss asserted for a questioned statute by the state's highest court. *Winters* v. *New York,* 333 U. S. 507, 518, 519 (1948). Moreover, there appear to be special and more strict rules where the statute to be interpreted is a criminal statute

rather than a civil one. See *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1938).[9]

If we compare the case at bar to *Shuttlesworth* v. *City of Birmingham*, —— U. S. —— (March 10, 1969) 37 L. W. 4203, a parallel argument emerges. In *Shuttlesworth*, a city ordinance, under which petitioner was convicted, granted certain powers to the licensing authority for parades. An intermediate appellate court in Alabama reversed the conviction on the grounds of the discriminatory misapplication of the statute. The Supreme Court of the

---

[9] Language of the Court in *Lanzetta* as applied to a newly passed New Jersey statute is equally applicable to the case at bar which is concerned with an old statute recently attempted to be resuscitated in *Epton*. The argument is further made by respondent, that despite the generality of the statute, the precision of the indictment saves the prosecution (Resp. B. pp. 6, 7). Viz.

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. Cf. *United States* v. *Reese*, 92 U.S. 214, 221; *Czarra* v. *Board of Medical Supervisors*, 25 App. D.C. 443, 453. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See *Stromberg* v. *California*, 283 U.S. 359, 368; *Lovell* v. *Griffen*, 303 U.S. 444. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. [Footnote omitted] The applicable rule is stated in *Connally* v. *General Construction Co.*, 269 U.S. 385, 391: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" (p. 453)

State affirmed the conviction "giving the language of §1159 [the ordinance] an extraordinarily narrow construction."

This Court held that "the ordinance *as it was written* . . . fell squarely within the ambit of the many decisions of this Court over the last thirty years holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority is unconstitutional (Emphasis supplied)."

This Court, however, apparently accepted the "job of plastic surgery 'upon the face of the ordinance'" performed by Alabama's highest court, but it refused to apply that interpretation retroactively—examining as it did so "the surrounding relevant circumstances" and noting that "First Amendment rights [were] hanging in the balance."

The parallel to the case at bar is compelling. An added factor here is that we now know that the statutes involved, §§160 and 161, are unconstitutional as written and as such writing was interpreted by this Court in *Gitlow* in 1925.

Assuming, *arguendo*, that the *Epton* gloss has restored constitutional validity to §§160 et seq., we are faced in the instant case with a situation where all the specific overt acts of law violation charged in the indictment occurred prior to May 16, 1967—the day the New York Court of Appeals decided *Epton*. Parenthetically, we must also note a distinction from *Shuttlesworth* that, as to the New York anarchy statutes, the New York State legislature had gone back to work in 1965 and had amended the law and specifically had *not* changed the language to conform to the new yet-to-be-pronounced interpretation of *Epton*.

As set forth in appellant Fernandez' "Reply Brief" (pp. 2-6), the criminal charges against him concern themselves with the expression of ideas, orally and in writing, and with association and membership—territory embraced by the First Amendment where this Court has always expressed its concern. *N.A.A.C.P.* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958); *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *United States* v. *Robel*, 389 U. S. 258 (1967); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964).

As repeatedly underlined in oral argument before this Court by counsel for the respondent District Attorney, the advocacy-of-doctrine statute (P. L. ¼160 et seq.) serves the function in these cases of supplying the element of criminal intent necessary to support the prosecution of petitioners under the other criminal statutes invoked against them. The indictment is divided into forty-eight counts. Counts Eight through Forty-eight are all weapons-possession counts. To provide the element of unlawful intent necessary to make such weapons-possession unlawful the District Attorney has added the unlawful-advocacy allegations of Counts One through Four (the anarchy counts).[10]

It has never been made clear by respondent District Attorney why a criminal action cannot be brought against these appellants on the weapons and arson charges under the state law without intermingling of the vague and overbroad charges of sedition. An answer suggests itself:

---

[10] Appellant Fernandez has not been indicted for illegal weapons possession. He has, however, been indicted for conspiracy to commit arson in the Third Degree. Presumably the anarchy counts against him (Counts One through Four) will supply the illegal intent to round out the arson charge. Certainly they will supply the prejudice before the jury.

appellants can be convicted for their "bad tendencies," as has happened to Americans in the past,[11] and need not be charged with the commission of crime.

In "Judicial Rewriting of Overbroad Statutes Protecting the Freedom of Association from Scales to Robel," 57 Cal. L. R. 240, 256-257 (1969), the author has stated:

> "It is usually assumed that to construe a statute narrowly in order to avoid constitutional questions is a mark of judicial self-restraint. By rewriting an overly broad statute a court may take the view that it is only subjecting the statute to a constitutional construction which the legislature must have intended. Furthermore, to declare the statute void for overbreadth would stigmatize the legislature for passing unconstitutional legislation.
>
> "The judicial self-restraint argument is based upon the fallacious assumption that judicial rewriting does not usurp legislative powers. This argument is not

---

[11] The trial of Thomas Cooper under the Sedition Acts has been described:

> "Cooper, then, was prosecuted because his criticism tended to lead to insurrection against the government. The causation, according to Rawle [the prosecutor], was indirect, but real. Having leaped from words to insurrection, Rawle found little difficulty in taking the short step from the 'bad tendency' of Cooper's words to his 'bad intent' in writing the words. Although Cooper denied any 'bad intent,' Rawle could not help suspecting him of the motives he disclaimed; he presumed that Cooper's 'conduct must have arisen from the basest motives.' Since the words tended to undermine public confidence in the president, the intent must have been bad, and it was the duty of the jury to show that this kind of attack on the government was not to be made with impunity." James Morton Smith, *Freedoms Fetters: The Alien and Sedition Laws and American Civil Liberties,* Cornell University Press (1956), p. 320.

well grounded. [Footnote omitted] When a court engages in the process of rewriting statutes it is telling the legislature that the statute should have been written in a particular way, even though the legislature may have had no such intention. A more conservative approach, and more in keeping with the theory of separation of powers would be to declare the statute invalid and permit the legislature to decide whether and in what form the statute should be rewritten and reenacted. [Footnote omitted] This seems to be the attitude adopted by the Court in *Robel* (*United States* v. *Robel*, 389 U. S. 258):

> 'The Government has told us that Congress, in passing §5(a)(1)(D), made a considered judgment that one possible alternative to that statute—an industrial security program—would be inadequate and ineffective to protect against sabotage in defense facilities. It is not our function to examine the validity of that congressional judgment. . . . We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake. The task of writing legislation which will stay within those bounds has been committed to Congress. [Footnote omitted]'"

Certainly the reasoning in *Epton* of the Court of Appeals and the court below was a variance with the *Robel* logic.

The foregoing recital provides the answers to the questions posed at the outset.

In the first place, it is clear that Penal Law §§160 et seq. as interpreted by the New York Court of Appeals and the court below in *Epton* are *not* constitutional under present standards of this Court.

In their *Epton* rulings the courts below added new elements to the bare language of the statute: 1.) intent to accomplish the overthrow of the government, and 2.) "clear and present danger" that the advocated overthrow may be attempted or accomplished.

In its invocation of "clear and present danger" of overthrow of the government, however, the Court of Appeals applied that language to *Epton* to mean only that the danger be "that the riots then rocking Harlem would be intensified or, if they subsided, rekindled" (*supra*, pp. 7-8). Thus, the court read out the necessity of "overthrow of the government" and the danger that such overthrow be "accomplished" as required by language in *Yates* v. *United States*, 354 U. S. 298 (1957); *Scales* v. *United States*, 367 U. S. 203 (1961); and *Noto* v. *United States*, 367 U. S. 290 (1961). It would appear that the statute as refurbished by *Epton* merely requires advocacy plus intention and that the advocacy and intention need only involve illegal action —not specifically overthrow of the government; nor does this new reading require as a necessary element the showing of danger that such overthrow may be accomplished.

In addition, the *Epton* court discounted the *Nelson* argument that the Smith Act and related federal legislation had preempted the field so that an indictment in 1964 or 1967 charging overthrow of the federal government under §§160 et seq. would be legal and constitutional.

Having answered the first question as to the present constitutionality of §§160 et seq. (as of 1967) in the negative, let it be assumed, *arguendo,* that this Court would hold otherwise—and would be impressed by the newly developed rationale in *Epton.*

The problem remains that appellant Fernandez herein and his fellow appellants, on the first day of October, 1965, up to and possibly beyond May 16, 1967, could have had no knowledge of the new-found interpretation of the Court of Appeals.

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. *In re Gliver,* 333 U. S. 257, and cases there cited." *Cole* v. *Arkansas,* 333 U. S. 196, 201 (1948).

Also see *Bouie* v. *City of Columbia,* 378 U. S. 347, 354-55 (1963); *N.A.A.C.P.* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 454-55 (1958).

Accordingly, based upon the arguments delineated above, i.e. the history of the legislation, the line of opinions of this Court and the particular posture of the appellant as to prior notice of the *Epton* court opinion, this Court should reverse the judgment of the court below and declare §§160 et seq. unconstitutional as applied to the facts herein.

II.

Appellant is concerned that the importance of the issues discussed *supra* as to the constitutionality of Penal Law §§160 et seq. and their application to appellant, might obscure his further challenge to the constitutionality of New York Judiciary Law §§596(6), 609 and 661 which appellant contends are unconstitutional on their face.

The application of these statutes which set up subjective criteria and a minimum monetary requirement round out the injustice inflicted upon him in the instant state prosecution. The technique provided by statute assures, not a cross-section of the community, or a group of peers to this young Afro-American interested in the civil rights of his contemporaries—but, rather, the kind of discrimination exercised in *Avery* v. *Georgia*, 345 U. S. 559 (1953). Cf. *Brooks* v. *Beto*, 366 F. 2d 1 (C. A. 5, 1966).

Cases such as *Avery, supra,* and *Whitus* v. *Georgia*, 385 U. S. 545 (1967), have been reversed because the procedure followed in the impanelling of the grand jury was found by this Court to have been discriminatory. The instant case involves a challenge to the language of the statute itself which, according to appellant, is necessarily and unconstitutionally discriminatory.

The court below refused to act on the appellant's challenge to the grand-jury law, invoking the principle of federal abstention but finding comfort in an affidavit of the county clerk submitted by respondents to the effect that "the property requirement had no significance in his selection of jurors"—and not allowing its comfort to be disturbed by a hearing on the facts [A. 68, 69].

Under all the circumstances it would seem that appellant will be unfairly deprived of due process of law if this Court does not move against this politically inspired and unfair prosecution.

Conclusion

The judgment of the court below should be reversed and the anarchy laws of New York State (P. L. §§160 et seq.) should be declared unconstitutional and unconstitutional as applied to appellant; this Court should further declare the New York Judiciary Law §§596(6), 609 and 661 unconstitutional on their face and as applied to appellant.

Respectfully submitted,

Eleanor Jackson Piel
Attorney for Appellant
Fred Fernandez

No. 9

Vide No. 7 for Brief of appellee Atty Gen of N.Y. (filed Mar 11, 1969)

Vide No. 7 for Brief of appellee Mackell. (filed Mar 11, 1969)

Vide No. 7 for Brief of Dist Attorney on reargument (filed Sept. 25, 1969

Vide No. 7 for Brief of Atty Gen of N.Y. on reargument. (filed Sept 11, 1969)